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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DANIEL COBLE
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-000378
CIVIL ACTION NO. 2024-CP-40-3454

Bernard Bagley, #175851.....**APPELLANT,**

v.

Palmetto Richland Hospital Prisma Health, John Doe, Surgeon, and South Carolina Department
of Corrections Division of Health Services, Defendants,

of which Palmetto Richland Hospital Prisma Health is the.....**RESPONDENT.**

INITIAL BRIEF OF RESPONDENT

Carmen V. Ganjehsani (S.C. Bar No. 73515)
R. Wilder Harte (S.C. Bar No. 101228)
Ashwin R. Sanzgiri (S.C. Bar No. 105198)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
asanzgiri@richardsonplowden.com
**Attorneys for Respondent Prisma Health –
Richland**

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. The circuit court properly granted summary judgment to Prisma because Bagley failed to present an expert affidavit as required by S.C. Code Ann. § 15-36-100(B).
 - A. By only making a conclusory argument regarding the circuit court's grant of summary judgment due to his failure to present the required expert affidavit, Bagley has abandoned any challenge to this ruling on appeal.
 - B. Bagley further failed to establish that the subject matter of his claims against Prisma fell within the common knowledge exception to the expert affidavit requirement where his claims arose out of alleged negligence and failure to adhere to the applicable standard of care involving a spinal surgery relative to a spinal decompression and spinal cord stenosis.

- II. In the alternative, the circuit court properly granted summary judgment to Prisma because it did not employ Bagley's treating physician and thus cannot be vicariously liable for any alleged negligence or deviation from the standard of care of such physician; Bagley further failed to present any evidence creating a genuine issue of material fact that Prisma otherwise owed any non-delegable duty to Bagley.

COUNTERSTATEMENT OF THE CASE

This appeal stems from Appellant Bernard Bagley’s pro se case against a number of defendants arising out of claims he asserted as medical malpractice claims. Bagley filed his original Complaint on June 6, 2024 against Palmetto Richland Hospital Prisma Health [properly identified as Prisma Health—Richland d/b/a Prisma Health Richland (hereinafter “Prisma”)], John Doe Surgeon, and the South Carolina Department of Corrections Division of Health Services. R. ____; Compl. Bagley asserted claims arising out of alleged spinal cord and neck injuries and related procedures. *Id.* Bagley’s filing cover sheet checked “Notice/File Med Mal” and was styled as a “Notice of Intent to File Suit Pursuant to § 15-36-100(C)(2), SC Code Ann. (Supp. 2023) And § 15-79-125, S.C. Code Ann.” *Id.* The sole attachment was “Exhibit A,” a record of cervical spine examination performed at the South Carolina Department of Corrections. R. ____; Compl. Ex. A. Bagley requested the circuit court appoint him counsel and award damages in the amount of \$300,000.00. R. ____; Compl.

Respondent Prisma moved for summary judgment, seeking dismissal of all of Bagley’s claims because, among other grounds: (1) Bagley failed to provide an expert witness to opine that Prisma was negligent and deviated from the applicable standard of care; (2) Prisma’s alleged negligence and deviation from the applicable standard of care did not fall within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the alleged conduct of Prisma; (3) Prisma did not employ the physician who performed Bagley’s procedure and was not vicariously liable for any alleged negligence and deviations of accepted standards of practice by this physician; and (4) because Prisma is not a “person” within the meaning of the term as used in 42 U.S.C. § 1983, Bagley’s § 1983/deliberate indifference claims against Prisma are barred. R. ____; Prisma Mot. for Summ. J. In support of the motion for summary judgment,

Prisma filed an Affidavit of its Director of HR Operations, Jim Reames, confirming that Dr. Gregory Grabowski—who was not named in Bagley’s pleadings but treated Bagley—was *not employed* by Prisma or any other Prisma entity. R. ___; Aff. of Jim Reames.

Thereafter, Bagley filed a Proposed Amended Complaint and Motion for Leave to File an Amended Notice of Intent, asserting essentially the same claims and renaming parties. R. ___; Proposed Am. Compl.; Mot. for Leave to Amend Compl. Bagley also filed a “Response to Defendants’ Answers and Declaration in Opposition to Defendants’ Answers” stating summarily that his pleadings did assert a cause of action. *See* R. ___; Response to Defs’ Answers and Dec. in Opp. to Defs’ Answers. Bagley also made various filings seeking extensions as to discovery, seeking to compel arbitration, and further opposing Prisma’s Motion for Summary Judgment.

Prisma’s Motion for Summary Judgment was heard by the circuit court on December 18, 2024 and taken under advisement. Thereafter, the circuit court issued a Form 4 Order granting the Motion for Summary Judgment and requesting a formal order within ten days. *See* R. ___; Form 4 Order. The circuit court then entered an Order on January 16, 2025, granting Prisma’s Motion for Summary Judgment because: (1) Prisma did not employ the physician who performed the procedure and thus could not be vicariously liable; (2) Bagley failed to present an expert witness or affidavit as required to establish deviation from any standard of care; (3) Bagley’s allegations are not within common knowledge; and (4) Prisma is not a “person” as used in 42 U.S.C. § 1983. R. ___; Order on Prisma’s Mot. for Summ. J. In response to that Order, Bagley filed a Motion styled “Rule 59(b)(c)(6) Motion for New Trial and Rule 60(B)(1)(3) Motion Relief From Judgment and Order, SCRCs” assigning a number of errors to the Order. R. ___; Pl’s Rule 59 and 60 Mot. The circuit court denied that Motion by Form 4 Order on February 4, 2025. R. ___; Form 4 Order (filed Feb. 4, 2025).

Bagley filed his Notice of Appeal to this Court on February 26, 2025.

COUNTERSTATEMENT OF FACTS

This recitation of facts is necessarily brief as Prisma's Motion for Summary Judgment was granted based on Bagley's failure to properly state claims, the result of which was that Prisma was entitled to judgment as a matter of law.

Because this Court's standard of review is the same as that of the circuit court below, this paragraph of the recitation of facts summarizes the allegations as asserted in Bagley's pleadings. Bagley filed his Complaint on June 6, 2024, asserting that he was admitted to Palmetto Richland Hospital Prisma Health (Prisma's facility) for an emergency procedure to decompress a spinal cord stenosis and pinched nerve. R. ___; Pl's Compl. Bagley asserts that his procedure was performed on March 2, 2023, and that in the weeks following, he was having complications with swallowing and having pain in his neck, throat, back, and other complications. *Id.* Bagley asserted that a later x-ray showed various issues with screws and that in subsequent appointments, a further procedure was recommended. *Id.* Bagley further asserted that he has since suffered excruciating pain and other complications due to protruding screws. *Id.* Bagley averred that his claims fall within a common knowledge exception and that no expert affidavit should have been required with his pleading.

Bagley provided no expert affidavit with his pleading, nor was one ever filed in the civil action below. Bagley never presented any expert testimony as to the standard of care or any deviations allegedly attributable to Prisma. Bagley likewise provided no evidence that Prisma employed the physician who conducted his procedure.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governed the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 434, 904 S.E.2d 889, 894 (Ct. App. 2024) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). “In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party.” *Isaac v. Onions*, 445 S.C. 525, 533, 915 S.E.2d 492, 496 (2025).

In cases such as this, “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENT

- I. **The circuit court properly granted summary judgment to Prisma because Bagley failed to present an expert affidavit as required by S.C. Code Ann. § 15-36-100(B).**
 - A. **By only making a conclusory argument regarding the circuit court's grant of summary judgment due to his failure to present the required expert affidavit, Bagley has abandoned any challenge to this ruling on appeal.**

The circuit court ruled Bagley failed to present an expert affidavit or any evidence from a qualified doctor opining that Prisma deviated from the applicable standard of care as required by S.C. Code Ann. § 15-36-100(B) and that further Bagley's claims did not fall within the common knowledge exception to the expert affidavit requirement. R. ____; Order at 3.

As an initial matter, Bagley has abandoned any appeal of that ruling because he has only made a conclusory statement regarding any alleged error of the circuit court and has not developed any argument challenging this ruling on appeal. Therefore, Bagley abandoned and thus waived any challenge to the circuit court's grant of summary judgment to Prisma due to Bagley's failure to present the required expert affidavit. *See e.g., Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); *Whitehurst v. Town of Sullivan's Island*, 446 S.C. 137, 157–58, 919 S.E.2d 402, 413 (2025) (noting issues abandoned because of conclusory arguments and noting failure to cite any authority as to issue or meet burden on appeal); *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42, 535 n.7 S.E.2d 642, 646 n.7 (2000) (noting issues abandoned when mentioned in brief but no argument is made); *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 290, 890 S.E.2d 748, 760 (2023) (issue abandoned when appellant made "no argument at all" on issue).

Because Bagley has abandoned any challenge to the circuit court's ruling that he failed to provide the required expert affidavit, the circuit court's grant of summary judgment on this basis

is dispositive. Accordingly, this Court can affirm the circuit court's grant of summary judgment on this ground alone. See *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (“The appellant excepted to the court's first conclusion, but has not excepted to its second ground of decision nor argued against it in the brief. Therefore, the finding below that sub-section (h) does not bar recovery for lack of causal connection, right or wrong, is the law of this case and requires affirmance. It would be pointless to consider the exceptions which do not reach this dispositive finding.”); see also Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 57, 382 S.E.2d 246, 250 (Ct. App. 1989) (“Montague and Sirrine have excepted to the first ground, but not to the second. ‘An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal.’”).

B. Bagley further failed to establish that the subject matter of his claims against Prisma fell within the common knowledge exception to the expert affidavit requirement where his claims arose out of alleged negligence and failure to adhere to the applicable standard of care involving a spinal surgery relative to a spinal decompression and spinal cord stenosis.

Even if this Court deems that issue not abandoned and validity preserved and raised, the circuit court's ruling, in the alternative, should be affirmed due to Bagley's failure to establish the subject matter of his action fell within the common knowledge exception to the expert affidavit requirement. South Carolina law requires that in any action against a licensed health care facility (such as Prisma) based on professional negligence, a plaintiff “must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” S.C. Code Ann. § 15-36-100(B). Further:

If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.

S.C. Code Ann. § 15-36-100(C)(1).

The statute also notes that matters within the ambit of common knowledge and experience do not require an affidavit. As was noted during the hearing below, Bagley's claims arose out of spinal surgery relative to a spinal decompression and spinal cord stenosis. Respectfully, Prisma asserts surgery involving the spine is an almost quintessential field for which expert testimony is required and decidedly not within the ambit of anyone's common knowledge. Indeed, this Court has even held that certain aspects of spinal surgery are not even within the ambit of knowledge of a medical doctor expert who was qualified to testify about other aspects of the case. *E.g., Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 57, 677 S.E.2d 32, 37 (Ct. App. 2009). When, as occurred below, a plaintiff files suit alleging professional negligence that is not within the common knowledge exception and fails to file an affidavit, a court must grant summary judgment. *E.g., H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 474, 748 S.E.2d 72, 74 (Ct. App. 2013) (noting necessity of affidavit). And, below, Bagley provided the Court no evidence to the contrary. Therefore, the circuit court properly granted summary judgment to Prisma due to Bagley's failure to submit the required expert affidavit in support of his claims.

- II. In the alternative, the circuit court properly granted summary judgment to Prisma because it did not employ Bagley's treating physician and thus cannot be vicariously liable for any alleged negligence or deviation from the standard of care of such physician; Bagley further failed to present any evidence creating a genuine issue of material fact that Prisma otherwise owed any non-delegable duty to Bagley.**

In the event this Court declines to affirm on the circuit court's ruling that Bagley failed to submit the required expert affidavit, this Court may also affirm the circuit court's grant of summary judgment to Prisma because it did not employ Bagley's treating physician and thus is not vicariously liable for any alleged negligence or deviation from the applicable standard of care by this physician. Bagley's assertions regarding apparent authority and non-delegable duty are inapplicable to this case. Bagley argues Prisma had a non-delegable duty in this case pursuant to the Supreme Court's ruling in *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). Bagley also cites the Restatement (Second) of Torts § 429, which was adopted in *Simmons*. See *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). However, neither the non-delegable duty rule nor the Restatement section, which was actually adopted in *Simmons*, apply here nor did Bagley provide sufficient (or any) evidence to defeat summary judgment on that issue.

In *Simmons*, the Supreme Court recognized a limited common law non-delegable duty for hospitals to render competent services to its patients. See *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000); *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001); *Newell v. Trident Med. Ctr.*, 359 S.C. 4, 597 S.E.2d 776 (2004). There, the Court stated "The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." *Simmons*, 341 S.C. at 42, 533 S.E.2d at 317. In *Simmons*, the Court established a test to determine if a hospital owed a patient a non-delegable duty to render competent care. 341 S.C. at 53, 533 S.E.2d at 323.

South Carolina courts now use the elements as stated in *Simmons* to analyze non-delegable duty. *Osborne*, 346 S.C. at 8, 550 S.E.2d at 321. Those elements are:

- (1) the hospital held itself out to the public by offering to provide services;
- (2) the plaintiff looked to the hospital, rather than the

individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. When the plaintiff does so, the hospital will be held vicariously liable for any negligent or wrongful acts committed by the treating physician. The hospital may attempt to avoid liability for the physician's acts by demonstrating the plaintiff failed to prove these factors.

Osborne, 346 S.C. at 8, 550 S.E.2d at 321.

As the non-moving party, once Prisma provided evidence that it did not employ Bagley's treating physician and thus established Bagley's asserted cause of action failed, the burden shifted to Bagley to establish a genuine issue as to a material fact. *See* Rule 56(c), SCRCP. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 490, 732 S.E.2d 205, 209 (Ct. App. 2012). Here, Bagley presented no evidence to the circuit court on any of the elements listed above, as was his burden once Prisma carried its initial burden. No evidence exists in the record before this Court that Bagley ever established a genuine issue as to what Prisma held out, what he was entitled to look to Prisma for, and what a person in similar circumstances would have believed. *Osborne*, 346 S.C. at 8, 550 S.E.2d at 321. As such, Bagley failed to establish a genuine issue as to any material fact and Prisma was entitled to summary judgment on the alternative basis that it was not vicariously liable for the alleged acts or inactions of Bagley's treating physician. *Kitchen Planners, LLC*, 440 S.C. 456, 464, 892 S.E.2d 297, 302 (2023).

Bagley also argues that "In addition, being the emergency surgery admitted hospital and caregiver they are liable for negligence even if they have a designated independent contractor." *See* Appellant's Br. at 3. However, this argument is inconsistent with the record before the trial court. The Affidavit provided by Prisma established that the doctor who treated Bagley was not employed by Prisma or any related entity; counsel below represented that the proper party relative to that treating

doctor was the University of South Carolina School of Medicine because that is who employed the doctor. As such, this case differs from *Tuomey* and other non-delegable duty cases. See *Newell v. Trident Med. Ctr.*, 359 S.C. 4, 13–14, 597 S.E.2d 776, 781 (2004) (“Vivian concedes, as she must, that she cannot meet the *Simmons / Osborne* apparent agency test and dismisses it as ‘simply irrelevant.’ Instead, she argues that Hospital's control of physicians holding staff privileges, as evidenced by the documents recited above, establishes actual agency. If Vivian is correct, then hospitals are potentially more responsible for the acts of admitting physicians than for the actions of physicians who are independent contractors as in *Osborne* and *Simmons*. We find neither precedent nor public policy support such a re-allocation of responsibility and liability between hospitals and physicians with staff privileges. We decline to adopt such a rule, and emphasize that hospital liability for non-employee physician negligence is limited to apparent agency situations.”). Here, Bagley should have brought his action against the correct party rather than Prisma. Even so, Bagley presented no evidence below which would sufficiently defeat a motion for summary judgment, especially in opposition to Prisma’s affidavit, and as such, his arguments to this Court do not warrant reversal. See *Kitchen Planners, LLC v. Friedman*, 440 S.C. at 463, 892 S.E.2d at 301 (“We now clarify that the ‘mere scintilla; standard does not apply under Rule 56(c). Rather, the proper standard is the ‘genuine issue of material fact’ standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, ‘it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.’”). Bagley did not provide any basis for the circuit court to find an issue of fact.

No evidence exists in the record before this Court which would create a genuine issue as to this non-delegable duty issue raised by Bagley. As such, this Court should affirm the circuit court’s dismissal of this case.

CONCLUSION

For the reasons set forth herein, Respondent Prisma Health – Richland respectfully requests this Court affirm the circuit court’s granting of summary judgment as to all of Appellant Bernard Bagley’s claims against Prisma Health – Richland.

Respectfully submitted,

/s Ashwin R. Sanzgiri

Carmen V. Ganjehsani (S.C. Bar No. 73515)

R. Wilder Harte (S.C. Bar No. 101228)

Ashwin R. Sanzgiri (S.C. Bar No. 105198)

RICHARDSON, PLOWDEN & ROBINSON, PA

1900 Barnwell Street (29201)

Post Office Drawer 7788

Columbia, South Carolina 29202

(803) 771-4400

cganjehsani@richardsonplowden.com

wharte@richardsonplowden.com

asanzgiri@richardsonplowden.com

**Attorneys for Respondent Prisma Health –
Richland**

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served the foregoing Respondent's Initial Brief, dated November 24, 2025, by depositing a copy of the Brief in the United States Mail to the following address:

Bernard Bagley
#175851/SB21b/KER.CI
4848 Gold Mine Highway
Kershaw, South Carolina 29067



Sandra K. Davidson

November 24, 2025.