

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Case No. 2009-CP-10-4943

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Barbara Roehm,

Appellant,

v.

Leigh McKenzie, MD,  
Ira Rosenshein, MD,  
Charla McEachin Napier, LMFT,  
Coastal Psychiatry, LLC,

Defendants,

Of whom Leigh McKenzie, MD and  
Charla McEachin Napier, LMFT are

Respondents.

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**INITIAL BRIEF OF RESPONDENT**

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**SC Court of Appeals**

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly found that Appellant failed to demonstrate a genuine issue of material fact that a doctor-patient relationship existed between Appellant and her then-minor son's adolescent psychiatrist.
2. Whether Appellant has abandoned any argument that her emotional distress claims would survive notwithstanding the lack of a doctor-patient relationship, and if not, whether the trial court properly granted summary judgment as to Appellant's emotional distress claims where Appellant was unable to present evidence to support one or more essential elements of each claim.
3. Whether Appellant's arguments that Respondent's motion lacked evidentiary support, and that Respondent should be equitably estopped from denying the existence of a doctor-patient relationship are preserved for appellate review where Appellant failed to seek a ruling on the issue or raised the argument for the first time on appeal, and if preserved, whether each argument merits consideration.

## STATEMENT OF THE CASE

Barbara Roehm (“Mother”) filed suit against Leigh McKenzie, MD (“Doctor”) and Coastal Psychiatry, LLC (“Practice”), along with Ira Rosenshein, MD, Charla McEachin Napier, LMFT, Louis Roehm (“Father”), and Elizabeth Roehm (“Step-Mother”) on August 10, 2009 in the Court of Common Pleas for Charleston County. (R. \_\_\_). Mother’s Complaint alleged nine causes of action against the defendants generally arising out of dispute between Mother and Father over custody of their then-minor adopted son Jonathan Roehm (“Son”) and an ensuing family court action and investigation by the South Carolina Department of Social Services (“DSS”).

Mother’s claims against Doctor and Practice specifically arise out of an affidavit that Doctor provided at the request of Father’s attorney for use in an emergency action that Father initiated in family court seeking custody of Son. (R. \_\_\_). Mother’s initial claims against Doctor and Practice included defamation/libel, intentional infliction of emotional distress, interference with parent-child relationship, fraud, unfair trade practices, malicious prosecution, abuse of process, and civil conspiracy. (R. \_\_\_). Mother expressly disavowed that a doctor-patient relationship existed between Mother and Doctor in her initial Complaint. (R. \_\_\_).

On July 19, 2011, Mother filed an Amended Complaint asserting that doctor-patient relationship existed between Mother and Doctor, and alleging causes of action against Doctor and Practice for medical malpractice, breach of duty of confidentiality, breach of fiduciary duty, defamation/libel/slander, fraud/constructive fraud/negligent misrepresentation, civil conspiracy, malicious prosecution, and negligent and/or intentional infliction of emotional distress/outrage. (R. \_\_\_).

Doctor and Practice moved for summary judgment on June 4, 2012. (R. \_\_). Doctor filed a supporting memorandum with exhibits A through F on November 26, 2012. (R. \_\_). Mother submitted a memorandum in opposition on November 26, 2012 with exhibits A and B and an affidavit of Barbara Roehm with exhibits A through I. (R. \_\_). Doctor submitted a reply memorandum on May 31, 2013 with exhibits A through D. (R. \_\_). Mother submitted a supplemental return in opposition to summary judgment on May 31, 2013. (R. \_\_). The motion for summary judgment was heard by the Honorable R. Markley Dennis, Jr. on May 31, 2013. (R. \_\_).

On June 18, 2013, the trial court issued an order granting summary judgment on all of Mother's claims against Doctor except civil conspiracy. (R. \_\_). The trial court found that Mother's claims for medical malpractice, breach of duty of confidentiality, and breach of fiduciary duty failed as a matter of law because Mother failed to show a genuine issue of material fact that a doctor-patient relationship existed between Doctor and Mother, or that Doctor otherwise owed or breached a duty of confidentiality or fiduciary duty to Mother. (R. \_\_). The trial court likewise found Mother failed to show a genuine issue of material fact to support viable claims for the remaining causes of action except civil conspiracy. (R. \_\_).

Mother moved to partially reconsider the order on June 26, 2013. (R. \_\_). Mother's motion to reconsider was limited to the claims premised on the existence of a doctor-patient relationship, and Mother's claim for negligent / intentional infliction of emotional distress. (R. \_\_). Mother withdrew her remaining claims for fraud, libel, slander, defamation and malicious prosecution. (R. \_\_).

Mother's motion to reconsider was denied by way of an order filed on August 2, 2013. (R. \_\_). Mother served the instant notice of appeal on August 29, 2013. (R. \_\_). Mother's appeal

was dismissed on November 25, 2013 and reinstated on February 11, 2014. Mother's initial brief was due on April 16, 2014, and was served and filed on April 17, 2014.

## INTRODUCTION

Mother's claims against Doctor arise out of a bitter divorce and custody dispute between Mother and Father. Doctor is an adolescent psychiatrist who treated their then-minor son beginning in 2004. (R. \_\_). Doctor subsequently became entangled in the custody dispute between Mother, Father and Step-Mother. In August 2007, amidst concerns about the potential abuse of Son at the hands of Mother, Father filed an emergency action to remove Son from Mother's custody, and Step-Mother contemporaneously made a report to DSS regarding Mother's suspected abuse of Son. (R. \_\_). At the request of Father's attorney, Doctor provided an affidavit for use in the emergency removal action, which Doctor believed to be in the best interests of Son based on her conclusion that Son was in imminent physical and psychological danger. (R. \_\_). The affidavit included Doctor's opinions regarding the potential abuse of Son based on Doctor's personal knowledge gleaned from her treatment of Son and her observations of Mother, along with information relayed to her by Father and Step-Mother that was later called into question. (R. \_\_).

Doctor's affidavit was submitted to the family court along with three other affidavits in support of Father's emergency removal action. (R. \_\_). The family court temporarily removed Son from Mother's custody, and a DSS investigation ensued. (R. \_\_). DSS ultimately determined that the allegations against Mother were unfounded. (R. \_\_). The family court subsequently found that the report made by Step-Mother was made in bad faith, and ordered the disclosure of her identity. (R. \_\_). Mother subsequently filed this action against Father, Step-Mother, Doctor and Practice, along with another psychiatrist and a family therapist. (R. \_\_).

After Mother asserted in the underlying family court action and initially in this action that she was not a patient of Doctor, (R. \_\_\_), Mother determined that this position no longer suited her and reversed course. In a blatant attempt to find insurance coverage for the claims against Doctor, Mother amended her Complaint to allege she was Doctor's patient, and asserted causes of action premised on this purported doctor-patient relationship. (R. \_\_\_). However, Mother's newfound theory did not change the facts, and the trial court properly granted summary judgment on all of the claims that are the subject of this appeal.

### **STANDARD**

An appellate court's review of a grant of summary judgment is subject to the same standard that governs the trial court under Rule 56(c), SCRPC. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 509 (2006). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

### Summary of Undisputed Material Facts

- Doctor specializes in adolescent psychiatry and provided psychiatric counseling for Son beginning in 2004 when Son was 10 years old. Doctor continued to treat Son through the summer of 2007. (R. \_\_.).
- Mother and Father divorced in 2005. Mother and Father thereafter began attending some of Son's counseling sessions with Doctor. (R. \_\_.). Mother and Father would not attend the entire counseling session, but would join Doctor and Son in the final minutes of the appointment. (R. \_\_.).
- The portions of the counseling sessions that Mother attended with Doctor, Son and Father were centered around Son and were for Son's benefit. The counseling sessions were not for Mother's benefit and were not meant to treat Mother in any way. (R. \_\_.).
- Mother never sought treatment from Doctor, and Doctor never gave Mother any advice on how to better her mental health. (R. \_\_.).
- Doctor never agreed to or intended to treat Mother or accepted Mother as a patient. (R. \_\_.). Doctor never examined Mother, created a patient file for Mother, or reviewed any of Mother's medical records. (R. \_\_.).
- Mother is not identified as Doctor's patient in any of Doctor's records. All of Doctor's records identify Son as Doctor's patient. (R. \_\_.).
- Mother's health insurance records identified Son as Doctor's patient. Mother was not identified as Doctor's patient in any of Mother's health insurance records. (R. \_\_.).
- Mother similarly attended Son's counseling sessions with his prior psychiatrist, but Mother does not believe that a doctor-patient relationship existed with his prior psychiatrist. (R. \_\_.).
- Doctor believed she was acting in the best interests of Son when she provided the affidavit for use in the family court action. Doctor believed that Son was in imminent physical and psychological danger, and at least three individuals had expressed to Doctor that Mother was abusing Son. (R. \_\_.).
- Mother submitted a response affidavit in the family court action stating "I have never treated with Dr. McKenzie. As a matter of fact, I have never spoken with Dr. McKenzie without my ex-husband and son in the room. More importantly, Dr. McKenzie has never asked any questions about my personality or medical history whatsoever. I have never been tested by Dr. McKenzie or her staff nor have they ever reviewed any of my medical records." (R. \_\_.).
- Mother alleged in her initial Complaint filed on August 10, 2009 against Doctor, *et al.*, that she was never a patient of Doctor, nor did Doctor medically examine her, review her medical records, or interview her at any point in time. (R. \_\_.).

## ARGUMENT

### **I. The trial court correctly found that Mother failed to present evidence to support the existence of a doctor-patient relationship.**

In her Brief of Appellant, Mother narrowly frames the dispositive question on appeal as whether the trial court correctly found that Mother failed demonstrate a genuine issue of material fact as to the existence of a doctor-patient relationship. Mother does not address the viability of the specific claims for medical malpractice, breach of confidentiality, breach of fiduciary duty, or negligent / intentional infliction of emotional distress absent a doctor-patient relationship. Instead, she concedes in a conclusory statement that each claim is dependent upon “the threshold issue of the doctor-patient relationship . . . .” (Brief of Appellant p. 12).

Indeed, it is well-established that a plaintiff cannot maintain a claim for medical malpractice absent a doctor-patient relationship. Willis v. Wu, 362 S.C. 146, 154, 607 S.E.2d 63, 67 (2004), and Mother’s additional claims alleged against Doctor in the Amended Complaint are all premised on the identical allegation that Doctor “undertook to counsel Plaintiff Mother and impliedly agreed to exercise and use a reasonable degree of professional skill and diligence in the care and/or treatment of and/or providing professional services for Plaintiff Mother.” (R. Amended Complaint, ¶54, Breach of Duty of Confidentiality; ¶58 Breach of Fiduciary Duty; ¶101 Negligent and/or Intentional Infliction of Emotional Distress).

Accordingly, any additional claim-specific arguments on these causes of action should be deemed abandoned on appeal. *See* Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”); Gamble v. Int’l. Paper Realty Corp. of South Carolina, 323 S.C. 367, 474 S.E.2d 438, 440 n. 1 (1996) (declining to address issue not set forth in the statement of the issues on appeal); Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 496 (Ct. App. 2004) (“[W]here an issue is not argued within the body

of the brief but is only a short conclusory statement, it is abandoned on appeal.”). Nonetheless, since Mother did independently address her claim for intentional and/or negligent infliction of emotional distress in her motion to reconsider, it will be addressed separately below.

**A. The undisputed facts show that no doctor-patient relationship existed between Mother and her son’s adolescent psychiatrist.**

The doctor-patient relationship “is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient.” Roberts v. Hunter, 310 S.C. 364, 366, 426 S.E.2d 797, 799 (1993); Hord v. United States, 178 F.3d 1283, \*4 (4th Cir. 1999) (unpublished) (“[t]he South Carolina Supreme Court made clear in Roberts that the agreement of the doctor to assist the patient is a *sine qua non* of the doctor/patient relationship.”); 18 S.C. JUR. *Negligence* § 59 (Supp. 2004) (“The establishment of a doctor/patient relationship is a prerequisite to a claim of medical malpractice. The relation is a consensual one in which the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient. Where a physician neither examines a patient nor reviews his file, no doctor/patient relationship exists.”). *E.g.*, Roberts, 426 S.E.2d at 799 (no doctor-patient relationship existed where the doctor did not examine or treat the alleged patient, and the doctor did not consent to treating the alleged patient); Tumblin v. Ball-Incon Glass Packaging Corp., 324 S.C. 359, 366, 478 S.E.2d 81, 85 (Ct. App. 1996) (affirming a directed verdict based on the absence of a doctor-patient relationship where the “only reasonable inference from the evidence in the record is that [defendant physician] neither injured [plaintiff] in the examination, nor did he intend to treat, care for, or benefit her.”).

Mother’s claims against Doctor are wholly premised on the affidavit Doctor provided in the family court action. Long before this litigation was initiated, Mother submitted her own

response affidavit to the family court in which she expressly disclaimed the existence of a doctor-patient relationship. Specifically, Mother attested in her affidavit,

. . . I have never treated with Dr. McKenzie. As a matter of fact, I have never spoken with Dr. McKenzie without my ex-husband and son in the room. More importantly, Dr. McKenzie has never asked any questions about my personality or medical history whatsoever. I have never been tested by Dr. McKenzie or her staff nor have they ever reviewed any of my medical records.

(R. \_\_\_\_, Roehm Affidavit, ¶3). Mother maintained that position for the next four years. In Mother's initial complaint filed on August 10, 2009, Mother specifically alleged that she "was not a patient of [Doctor]" and that Doctor did not "medically examine [Mother], review [Mother's] medical records, or interview [Mother] at any point in time." (R. \_\_\_\_, Complaint ¶22). When Mother was initially deposed in 2010, she reiterated that she is not, nor has she ever been a patient of Doctor. (R. \_\_\_\_, Tr. Roehm Depo. Vol. 1, p. 269:23-270:14). It was only after Mother recognized the implications of her position that it suddenly changed.

Mother amended her Complaint on July 19, 2011 to assert that she was part of "family counseling" sessions with Doctor, which purportedly gave rise to a doctor-patient relationship. However, Mother's sudden change in position did not change the facts. Even after Mother made this about-face, she reiterated all of the facts demonstrating the lack of doctor-patient relationship when her deposition was resumed:

**Mr. Weatherly:** . . . Did you ever personally seek treatment either verbally or in writing from Dr. McKenzie for your own personal psychological benefit?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did Dr. McKenzie either verbally or in writing ever tell you that she agreed to or intended to treat you personally?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did Dr. McKenzie ever verbally or in writing state to you that she accepted you as a patient?

**Ms. Roehm:** No.

**Mr. Weatherly:** I'm going to show you a registration form that we'll mark as Exhibit 9.

**Mr. Weatherly:** And the top of this document says Coastal Psychiatry, LLC, Patient Registration Form; do you see that?

**Ms. Roehm:** Yes.

**Mr. Weatherly:** Did you ever fill out a form such as this or something similar to this for yourself with your name in the section for patient's name?

**Ms. Roehm:** No.

**Mr. Weatherly:** I'm going to hand you what we'll mark Defendant's -- and we're finished with that one. We'll mark this document as Exhibit 10.

**Mr. Weatherly:** And this exhibit is an initial contact form from Coastal Psychiatry, LLC where the patient's name is Jonathan Roehm. Did you ever fill out or are you aware of anyone filling out a document that looks like this or is similar to this with your name in the area of patient name?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did Dr. McKenzie ever examine you?

**Ms. Roehm:** No.

**Mr. Weatherly:** . . . To your knowledge, did Dr. McKenzie ever create a file on you?

**Ms. Roehm:** No, not to my knowledge.

**Mr. Weatherly:** To your knowledge, did Dr. McKenzie ever review any of your medical or psychiatric files?

**Ms. Roehm:** Not to my knowledge.

(R. \_\_\_, Tr. Roehm Depo. Vol. 2, p. 27:4-28:20).

Mother did not seek treatment from Doctor. Doctor did not accept Mother as a patient or otherwise agree to treat Mother. Doctor did not examine Mother or review Mother's medical

records. Doctor did not create a patient file for Mother and Mother is not identified as a patient in any records. Despite these clear and unambiguous admissions by Mother, she now relies on the argument that Doctor was her psychiatrist by virtue of the fact that Mother occasionally sat in on the final few minutes of Doctor's counseling sessions with Son. However, Mother conceded that the portions of these sessions that she now claims were "family counseling" sessions were not for her benefit and were not meant to treat her in any way:

**Mr. Weatherly:** And we discussed earlier that you believe that it's reasonable for a psychiatrist who is treating an adolescent to gain information about his environment from sources other than him, right?

**Ms. Roehm:** Right.

**Mr. Weatherly:** And is that what Dr. McKenzie was doing at the end of these sessions with Jonathan?

**Ms. Roehm:** Well, she was doing that, but she was also giving us advice about what to do.

**Mr. Weatherly:** Is that advice in order to better Jonathan's mental health?

**Ms. Roehm:** Uh-huh.

**Mr. Weatherly:** Is that a yes?

**Ms. Roehm:** Yes, yes; I'm sorry.

**Mr. Weatherly:** Did she ever give you advice on how to better your mental health?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did she ever give you advice as to how to help Louis' mental health?

**Ms. Roehm:** No.

**Mr. Weatherly:** It was all centered around Jonathan, right?

**Ms. Roehm:** Yes.

**Mr. Weatherly:** Now, tell me specifically what information you have that any of these visits from March 2005 through July 2007 were family therapy sessions as opposed to sessions with Jonathan where she was learning information from you to better his treatment?

**Ms. Roehm:** More -- she was really giving more advice throughout all the ones I went to. The same, you know, hints about his study habits, hints, you know, how to deal with him kind of stuff.

**Mr. Weatherly:** But that was for the purpose of treating Jonathan; is that fair.

**Ms. Roehm:** Well, yeah, make -- make a situation.

**Mr. Weatherly:** [Are] there any other facts that you're aware of that would indicate that Dr. McKenzie was conducting family therapy sessions as opposed to individual sessions with Jonathan where she was either advising you on how to help his mental condition or gaining information from you about his environment or about him?

**Ms. Roehm:** I don't know. There's some other things in the -- we got -- we subpoenaed records and then we got a second set of records. I have not looked through the second set of records. There's extra papers and stuff in there.

**Mr. Weatherly:** And I'm not necessarily concerned with the records. What I'm concerned with is what you personally have knowledge of as you sit here today.

**Ms. Roehm:** Oh, okay. No.

(R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 103:24-105:21).

Notably, Mother similarly attended Son's counseling sessions with his prior psychiatrist, but Mother readily admits that her exact same presence in counseling sessions with another psychiatrist did not give rise to a doctor-patient relationship with that psychiatrist under nearly identical circumstances. (R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 25:13-27:3). The only difference, of course, is that Mother is not suing Son's prior psychiatrist. In short, Mother's assertion that a doctor-patient relationship existed materialized well after this litigation began, in direct opposition to her earlier, long-held position, and is a thinly veiled attempt to trigger insurance coverage for her claims.

**B. A parent is not a patient of her adolescent child's psychiatrist.**

A number of courts in other jurisdictions have addressed the precise argument that Mother makes, and each has come to the same inescapable conclusion: psychiatrists owe a duty to their adolescent patients and no one else, including parents who occasionally attend therapy sessions. *E.g.*, Althaus ex rel. Althaus v. Cohen, 562 Pa. 547, 549, 756 A.2d 1166, 1167 (2000) (“[A] treating psychiatrist or psychologist does not have a duty to the non-patient parents”); Ryder v. Mitchell, 54 P.3d 885, 886 (Colo. 2002) (“[T]he duty the therapist owes the children themselves is primary and may, under certain circumstances, require disclosure to the parents or other involved parties.”); Ramsey v. Yavapai Family Advocacy Ctr., 225 Ariz. 132, 142, 235 P.3d 285, 295 (Ariz. Ct. App. 2010) (“[I]n treating an alleged victim of abuse, a health care professional owes no duty of care to [a parent as] an alleged third-party abuser”).

In each of those cases, like the instant action, a psychiatrist reported or participated in the investigation of potential child abuse; the parent accused of child abuse was ultimately vindicated after a full investigation was conducted; and the plaintiff-parent alleged that the psychiatrist owed some duty of care as their own physician. Each of those respective courts found that the plaintiff-parent was not a patient of the psychiatrist and, regardless, it was unquestionably in the public's best interests to encourage a treating psychiatrist to responsibly participate in the investigation and/or reporting of potential child abuse without fear of civil reprisal. Althaus, 756 A.2d at 1168-70; Ryder, 54 P.3d at 892-93; Ramsey, 235 P.3d at 294-95. These courts further recognized that to not actively shield such individuals from civil liability would be a dangerous disservice to a potentially abused child and the public at large, especially when it is undisputed that the reporting professional has good reason to believe the minor is being abused. *E.g.*, Althaus, 756 A.2d at 1171 (“[T]he societal interest in encouraging treatment

of child abuse victims and maintaining the trust and confidentiality within the therapist/patient relationship dictates against the imposition of a duty of care beyond that owed to the patient.”).

**C. Mother’s attempts to show a genuine issue of material fact as to the existence of a doctor-patient relationship are illusory.**

The purported evidence offered by Mother to support her mid-litigation epiphany that a doctor-patient relationship existed includes Mother’s occasional presence at counseling sessions that were admittedly for Son’s benefit, some isolated references in Doctor’s medical and billing records to Mother and “parent training,” and last but not least, a statement on the letterhead of Doctor’s practice group.

First, Mother points to claim form that was submitted to Mother’s health insurer, in which a box for “Parent Training” is checked as one of the types of treatment. (R. \_\_\_ Roehm 2d Aff. ¶16 and Ex. A to Roehm 2d Aff.). Mother not only ignores the portion of the form directly above identifying Son as the patient, but also acknowledges that no claim forms were ever submitted identifying her as Doctor’s patient, and that her health insurer never identified her as Doctor’s patient in any explanation of benefits. (R. \_\_\_, Tr. Roehm Depo. Vol. 2, p. 30:7-22). Mother cannot point to a single document that identifies her as Doctor’s patient.

Mother then turns to Doctor’s therapy notes, which again identify Son as Doctor’s patient. Mother argues that she was somehow transformed into a patient by virtue of the fact that Doctor’s therapy notes reflect Mother’s and Father’s presence at the counseling sessions they attended and briefly described Doctor’s relevant observations of them. However, Mother’s own testimony cited above reveals that her occasional presence during the final minutes of Son’s counseling sessions and any advice she received at these counseling sessions was solely for the benefit of Son. (R. \_\_\_, Tr. Roehm Depo. Vol. 2, p. 103:24-105:21).

Mother also tries to assert that language on the letterhead of Doctor's practice group, "serving the needs of families" somehow creates a question of fact as to whether a doctor-patient relationship existed. According to Mother's logic, the statement "serving the needs of families" necessarily means that every health care provider in the practice group conducts family therapy, and therefore, Mother was a patient of Son's adolescent psychiatrist. However, the undisputed facts show that Doctor was not engaged in family therapy. Doctor does not practice family therapy and never held herself out as a family therapist. (R. \_\_\_\_). Doctor's records contain no references to family therapy. (R. \_\_\_\_). Mother admitted that Doctor never made any representations to her that she specialized in family counseling or family psychiatry. (R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 65:14-16). Rather, the records and Mother's own admissions reflect the exact opposite, that Doctor actually referred Mother, Father and Son to a family therapist, and Mother, Father and Son attended separate counseling sessions with that family therapist. (R. \_\_\_\_).

Finally, Mother attempts to rely on the deposition of Doctor's former partner, Dr. Rosenshein, despite that Dr. Rosenshein was admittedly not qualified in the field of adolescent psychiatry and expressly stated that he was not offering any opinions on whether Doctor complied with the applicable standard of care. (R. \_\_\_\_, Tr. Rosenshein Depo., p. 55:20-21; p. 56:17-19; p. 56:23-25; p. 91:17-92:4). *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 626 S.E.2d 1, 3 (2006) (a party opposing a motion for summary judgment in a medical malpractice action is required to present evidence that meets the general criteria for proving a medical malpractice claim to demonstrate a genuine issue for trial).

Dr. Rosenshein's testimony on the issue at hand, the existence of a doctor-patient relationship, was that he had no personal knowledge of whether such a relationship existed

between Mother and Doctor. (R. \_\_\_\_, Tr. Rosenshein Depo., p. 91:2-16). See id.; Rule 56(e), SCRCPC (“[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein.”)

The undisputed testimony of Doctor and Mother confirms that no such relationship existed:

**Mr. Weatherly:** . . . Did you ever personally seek treatment either verbally or in writing from Dr. McKenzie for your own personal psychological benefit?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did Dr. McKenzie either verbally or in writing ever tell you that she agreed to or intended to treat you personally?

**Ms. Roehm:** No.

**Mr. Weatherly:** Did Dr. McKenzie ever verbally or in writing state to you that she accepted you as a patient?

**Ms. Roehm:** No.

\* \* \*

**Mr. Weatherly:** Did Dr. McKenzie ever examine you?

**Ms. Roehm:** No.

**Mr. Weatherly:** . . . To your knowledge, did Dr. McKenzie ever create a file on you?

**Ms. Roehm:** No, not to my knowledge.

**Mr. Weatherly:** To your knowledge, did Dr. McKenzie ever review any of your medical or psychiatric files?

**Ms. Roehm:** Not to my knowledge.

(R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 27:4-28:20).

Doctor testified as follows in her deposition:

**Ms. Dey:** . . . Did you ever review any of Barbara's medical records from any source?

**Dr. McKenzie:** No, I would have no reason to ask for Barbara's medical records. She's not a client.

**Ms. Dey:** Okay. And you never spoke with any of her doctors; correct?

**Dr. McKenzie:** No.

(R. \_\_\_, Tr. McKenzie Depo. Vol. 1, p. 174:11-18).

The trial court was presented with overwhelming evidence that no doctor-patient relationship existed between Doctor and Mother. Mother asserted this position at the time of the controversy giving rise to this litigation, and she maintained the exact same position when she initiated this litigation. It was only after Mother determined that this position no longer suited her that she reversed course and claimed that a doctor-patient relationship indeed existed. However, the underlying facts have not changed. The trial court properly found that Mother was unable to demonstrate a genuine issue for trial as to the existence of a doctor-patient relationship and granted summary judgment accordingly.

**II. The trial court properly found that Mother's emotional distress claims failed as a matter of law.**

Mother's Amended Complaint asserts a combined claim against Doctor for Negligent and/or Intentional Infliction of Emotional Distress. (R. \_\_\_, Amended Complaint ¶¶ 98-108). Although Mother's motion to reconsider the trial court's grant of summary judgment could be construed as advancing an argument that these claims should stand notwithstanding the lack of a doctor-patient relationship, Mother does not present this argument on appeal, and Doctor respectfully submits that the Court should deem it abandoned. *See* Rule 208(b)(1)(B), SCACR; Gamble, 474 S.E.2d at 440 n. 1; Ellie, Inc., 594 S.E.2d 485 at 496. Nonetheless, Doctor addresses these claims separately out of an abundance of caution.

**A. A cause of action for negligent infliction of emotional distress is limited to bystander claims.**

In combining claims for “negligent and/or intentional infliction of emotional distress,” it is unclear whether Mother appreciates the significant distinction between the two. South Carolina recognizes a negligent infliction of emotional distress claim, but only in the context of “bystander recovery.” Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985) (recognizing that a claim for NIED can be brought by a bystander who witnessed an accident resulting in the death or serious physical injury of a close relative). Mother has not alleged or presented any facts to support a claim under Kinard to recover for emotional distress caused by witnessing an accident. Accordingly, her claim for negligent infliction of emotional distress fails as a matter of law.

**B. Mother failed to present evidence to support a viable claim for intentional infliction of emotional distress.**

In order to recover for the intentional infliction of emotional distress, a plaintiff must establish the following: “(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it.” Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778-79 (1981).

Mother failed to present any evidence to support the first element of her IIED claim, that Doctor intentionally or recklessly inflicted severe emotional distress on her. Mother asserts that Doctor’s intent to inflict emotional distress is derived solely from the fact that Doctor submitted

the affidavit for use in the emergency removal action in family court rather than reporting the suspected abuse to DSS directly. (R. \_\_\_\_, Tr. Roehm Depo.Vol. 2, pp. 117: 25-118:1-6.).

However, Mother admits in direct contradiction that she has no proof that Doctor was not in actually acting in the best interests of Jonathan when submitting this affidavit, as Doctor believed she was doing. (R. \_\_\_\_, Tr. Roehm Depo.Vol. 2, p. 59:10-14). Mother also oddly asserts that she would not have suffered severe emotional distress if Doctor had reported the suspected abuse to DSS rather than in the family court action, despite that both settings inflicted the same harm of Mother possibly losing custody of Son (R. \_\_\_\_, Tr. Roehm Depo.Vol. 2, p. 119:1-14). The only reasonable conclusion is that Mother is attempting to create a cause of action that is unsupported by the evidence. In fact, the only evidence Mother has proffered on such intentional conduct is her own mistaken belief.

**Mr. Weatherly:** Do you have any knowledge one way or another whether Dr. McKenzie's intent by making that statement was to harm you?

**Ms. Roehm:** I've run this over in my mind. I think there's no other answer than it was.

(R. \_\_\_\_, Tr. Roehm Depo.Vol. 2, p. 33:20-24). Mother was unable to specify any facts to support this belief.

**Mr. Weatherly:** Okay, I'll rephrase it. What facts do you have personal knowledge of that Dr. McKenzie knew that if she reported—or if she provided this affidavit within the context of a Family Court's action, that it would cause you severe emotional distress; but if she reported it outside of a Family Court action, that it would not?

**Ms. Roehm:** This isn't belief anymore? This is facts?

**Mr. Weatherly:** This is facts to support your belief.

**Ms. Roehm:** Don't have any.

(R. \_\_\_\_, Tr. Roehm Depo.Vol. 2, p. 120:7-15).

Moreover, it is undisputed that Doctor believed she was acting in the best interests of Son when she provided the affidavit, that Doctor believed everything she stated in her affidavit, including her belief that Son was in imminent physical and psychological danger, and that at least three individuals had expressed to Doctor that Mother was abusing Son. (R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 72:2-6; p. 126:17-21; p. 92:24-93:1-5). Mother herself agreed that if Doctor genuinely believed that Son was being abused, it was appropriate for Doctor to want Son removed from Mother's care. (R. \_\_\_\_, Tr. Roehm Depo. Vol. 2, p. 125:19-22).

As a matter of law, providing an affidavit to support the removal of Son from Mother's custody under circumstances where Doctor believed Son to be in imminent physical and psychological danger does not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Condemning Doctor's conduct as "exceed[ing] all possible bounds of decency. . . atrocious, and utterly intolerable" would have chilling effect on reporting suspected abuse and participating in emergency removal actions. Accordingly, the trial court properly found that Doctor was entitled to judgment as a matter of law on Mother's claim for intentional infliction of emotional distress.

### **III. Additional arguments raised by Mother are not preserved for appellate review.**

Mother raises two additional arguments that are not preserved for appellate review and would not merit consideration if they were.

#### **A. Mother failed to seek a ruling on her argument that Doctor was required to file an affidavit with the motion.**

In section A of the Brief of Appellant, Mother argues that Doctor's motion should have been dismissed on grounds that it lacked evidentiary support because it was filed without any affidavits or deposition testimony. (Brief of Appellant p. 6). Mother should have sought a ruling from the trial court on this issue in her motion to reconsider, but did not. Accordingly, it is not

preserved for review. *E.g.*, I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that, if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review); Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

Moreover, Mother misunderstands a defendant’s initial burden in moving for summary judgment. A defendant is not required to support a motion for summary judgment with affidavits or deposition testimony when the motion is based on the nonmoving party’s inability to demonstrate a genuine issue of material fact as to an essential element of a claim. *See* Rule 56(b), SCRPC (“A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.”); Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (“The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial.”).

Doctor’s motion was brought on grounds including, *inter alia*, Mother’s inability to support each claim alleged in the complaint, and was supported largely by Mother’s own statements, admissions, pleadings and testimony. Further, Doctor’s memorandum and supporting materials were served and filed some six months before the motion was actually heard.

**B. Mother's equitable estoppel argument raised for the first time on appeal is not preserved for review.**

In section of D of the Brief of Appellant, Mother argues for the first time on appeal that Doctor should be estopped from denying that a doctor-patient relationship exists. (Brief of Appellant pp. 12-14). Mother's argument is curious in light of her own blatantly inconsistent positions taken on the existence of a doctor-patient relationship in the family court action and in this action. Nonetheless, Mother should have raised this argument in the trial court if she wished to preserve it for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (it is "axiomatic that an issue cannot be raised for the first time on appeal.").

If Mother had properly preserved this argument, Doctor would have shown this argument to be without merit. Mother recites the elements of equitable estoppel, but fails to logically connect the doctrine to the facts she identifies in support of its application. Mother appears to attach some significance to the allegation that Doctor "billed her insurance company for therapy she provided to [Mother]." Aside from this allegation being wholly unsupported by any evidence, Mother does not specify how she relied on the manner in which her health insurer was billed for her Son's treatment, or identify what position she changed as a result.

Clearly Mother has changed her position on one issue – the existence of a doctor-patient relationship – but that occurred in the middle of this litigation, four years after she filed an affidavit in the family court denying that she was patient of Doctor's, and two years after she filed her initial complaint again denying she was ever Doctor's patient. If anything, Mother should be estopped from claiming the existence of a doctor-patient relationship under principles of judicial estoppel.

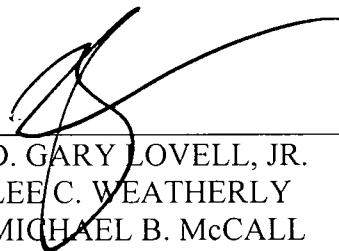
The doctrine of judicial estoppel precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. Hayne Fed. Credit Union v. Bailey,

327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). The purpose of the doctrine is to protect the integrity of the judicial process and the courts. Id. “When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” Id. Here, the position Mother previously took in the family court action and earlier in this same litigation is in direct conflict with the position she now takes. Mother’s change in position falls squarely within the type of conduct that judicial estoppel was intended to prevent. *E.g.*, Hayne Fed. Credit Union, 489 S.E.2d at 477 (father who swore in a prior divorce proceeding that he had no legal interest in the property was judicially estopped from claiming ownership in subsequent foreclosure action); Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000) (where litigant previously filed an answer and counterclaim denying ownership of corporation, he was judicially estopped from claiming in the present action that he is the sole owner of the corporation).

#### CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the trial court’s order granting summary judgment should be affirmed.

Respectfully submitted,



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